

Iowa Department of Inspections and Appeals  
Division of Administrative Hearings  
Wallace State Office Building  
Des Moines, Iowa 50319

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Rafael Luna Hernandez	)	
Hernandez Roofing, LLC	)	
6332 N.E. 8 <sup>th</sup> Ct.	)	Case No. 23IWDMM0009
Des Moines, IA 50313	)	
	)	
Appellant,	)	
	)	<b>ADMINISTRATIVE LAW</b>
v.	)	<b>JUDGE DECISION</b>
	)	
Iowa Workforce Development,	)	
	)	
Respondent.	)	

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**STATEMENT OF THE CASE**

Rafael Hernandez appealed from a June 13, 2022 decision by Iowa Workforce Development (IWD) that an employer-employee relationship existed between his business, Hernandez Roofing, LLC., (Hernandez Roofing) and Rafael Gonzalez Cruz and other workers performing services for the entity. The matter was transmitted by IWD to the Administrative Hearings Division to schedule a contested case hearing. A telephone hearing was conducted on September 26, 2022. Attorney Valerie Cramer represented Hernandez Roofing. Hernandez personally appeared for the hearing and testified. Rogelio Colin also appeared and testified for the Appellant with assistance from a Spanish language interpreter.

Attorney Jeffrey Koncsol represented IWD. IWD Field Auditor Lisa Gaeta also appeared and testified for IWD. Prior to the hearing, IWD submitted its 32-page Appendix, which includes the decision letter; the appeal letter and attachments; IWD’s synopsis, and the findings letter. All documents were admitted into evidence without objection.

**ISSUE**

Whether an employer-employee relationship existed between Hernandez Roofing, LLC., Rafael Gonzalez Cruz and/or other workers performing services for Hernandez Roofing LLC.

## FINDINGS OF FACT

### *General Background*

In October 2021, Gaeta received a copy of a cancelled unemployment insurance benefits check written to an individual allegedly employed by Hernandez Roofing. Gaeta subsequently discovered that the unemployment insurance registration on file for Hernandez Roofing was incomplete. She therefore opened an investigation to verify the entity's compliance with the Iowa Employment Security Law. *See* Iowa Code Chapter 96 (2021). Hernandez was and continues to be the sole owner/member of the limited liability company. Central to Gaeta's review was whether persons who performed services for Hernandez Roofing were properly classified as independent contractors, rather than employees. (Gaeta Testimony; IWD App. at 10-13).

Gaeta began her investigation by submitting an audit notification letter and pre-audit questionnaire to Hernandez. In January 2022, she received an email from attorney Valerie Cramer indicating she was asked by Hernandez to collect the necessary documents, but needed additional time to do so. Gaeta extended the deadline for submittal to February 15, 2022. (Gaeta Testimony; IWD App at 14).

Due to initial technical difficulties, Gaeta received tax returns, copies of cancelled checks and Hernandez' responses to the questionnaire on March 10, 2022. On the questionnaire, Hernandez was listed as the sole owner/partner/member or corporate officer. The company answered "yes" when asked if any people worked for the Hernandez Roofing on a casual or temporary basis, but responded "no" when asked if those individuals were reported on quarterly IWD reports. The answer "none" was provided when asked whether any of the following are provided at the employer's expense:

- expense reimbursement
- company vehicle
- meals
- menu/cafeteria plan
- profit sharing
- lodging
- health insurance plan
- retirement plan
- other

(IWD App. at 19). Hernandez Roofing also denied making any deductions from pay, including for retirement, insurance or dependent care. (IWD App. at 19).

Gaeta next mailed to Hernandez a "services provided" questionnaire listing the names of workers to whom checks had been written between 2017 and 2021. The questionnaire asked how each worker was paid, whether he or she submitted invoices, and whether he or she carried liability insurance. The completed questionnaire was returned by Cramer on March 28, 2022 (Gaeta Testimony; IWD App. at 14).

Gaeta also mailed five “questionnaires to determine status of worker” to five workers. None of these questionnaires was returned. (Gaeta Testimony; IWD App. at 14).

Based on the documents received, along with her own search of state databases and the internet, Gaeta determined the following workers were independent contractors: Noe Colin, Jeff Reetz, Hugo Santos, Francisco Cabrera, Iran Castellano, Fidel Castro Ramirez, Arnold Lazo, Hector Lopez and Maria Oviedo Ortiz. Gaeta’s independent research revealed that Ortiz is a member of Tortilleria Luna, LLC, which sells tortillas. Lopez has a contractor’s registration on file, along with an incomplete IWD registration. The remaining persons found to be independent contractors were paid larger dollar amounts than most other workers, which suggested to Gaeta that they themselves used multiple workers to complete the job.

Gaeta determined ten individuals were employees, however, based on the amounts paid to them by Hernandez Roofing. Additionally, there was no online evidence any operated an independent business, such as a business site and/or advertising. None had contractor’s registrations, identifiable business insurance, unemployment insurance accounts or Iowa Secretary of State registrations. Each also appeared to work continuously for Hernandez Roofing, in the company’s normal course of business. (Gaeta Testimony; IWD App. at 15)

On April 12, 2022, Gaeta mailed a letter to Hernandez informing him of her findings. The letter requested that Hernandez Roofing submit any additional evidence by May 30, 2022. (Gaeta Testimony; IWD App. at 21-22).

On April 19, 2022, Cramer emailed Gaeta and indicated Hernandez Roofing disagreed with the findings. No new information was provided by the company, however. Accordingly, on June 13, 2022, IWD issued its Unemployment Insurance Tax Audit Results showing amounts owed due to employee misclassification. (Gaeta Testimony; IWD App. at 10-13).

Hernandez testified credibly during the hearing that all of the individuals who perform labor and other services for his company work independently of Hernandez Roofing. Specifically, Hernandez is informed of a roofing job through general contractors and other entities. He then sends text messages to various individuals, and asks whether each is available and interested in providing the labor. Each of these persons is familiar with the then-current industry rate per “square.” If interested, the individual receiving the text then will recruit his own co-workers or employees to perform the labor. Notably, the roofing materials—including nails—are provided by the general contractor. The individual laborer (subcontractor) furnishes transportation and equipment for him and his crew. (Hernandez Testimony).

Additionally, the subcontractor makes his own hours and completes the work on his own schedule (presumably consistent with the ultimate deadline established by the general contractor). If the general contractor is not satisfied with the quality of

construction, the individual who accepted the job is responsible for fixing the issue at his own expense. (Hernandez Testimony).

Colin testified consistently with Hernandez that although he provides regular labor services to Hernandez Roofing, he is free to also work for other entities. Hernandez will contact him with information regarding a potential roofing job, and Colin may accept or reject the job, depending on his circumstances at the time. Hernandez Roofing will then pay Colin an agreed-upon amount per square, rather than an hourly rate. No written invoice is provided, however. Terms are confirmed orally or via text message. (Colin Testimony).

Additionally, Colin stated that if he accepts a job, he in turn hires three or four people to work with him. Colin and/or the other workers will provide their own transportation to the worksite. Colin—not Hernandez Roofing—provides necessary tools, such as compressors and nail guns. Colin receives no vacation pay and/or benefits from Hernandez Roofing. (Colin Testimony).

### **CONCLUSIONS OF LAW**

For purposes of unemployment compensation, the term “employer” is defined under Iowa law as an employing unit that, in any calendar quarter in the current or preceding calendar year, paid wages of \$1,500 or more, or employed at least one individual for some portion of a day in each of twenty different calendar weeks during the current or preceding calendar year.<sup>1</sup> “Employment” is defined as service performed for wages or under any contract of hire, written or oral, express or implied.<sup>2</sup> An employer claiming that any employment is not “employment” under the Iowa Employment Security Law, bears the burden to prove the exemption claimed.<sup>3</sup>

In the unemployment compensation context, it is well-settled that “the right to control the manner and means of performance is the principal test in determining whether a worker is an employee or independent contractor.”<sup>4</sup>

The relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. An employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. It is not necessary that the employer actually

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<sup>1</sup> Iowa Code § 96.1A(16)(a) (2021). An employing unit paying wages exclusively for domestic service is excluded from this definition. *Id.*

<sup>2</sup> Iowa Code § 96.1A(18)(a) (2021).

<sup>3</sup> Iowa Admin. Code r. 871-22.7(3), 23.55(2).

<sup>4</sup> *Gaffney v. Department of Employment Services*, 540 N.W.2d 430, 434 (Iowa 1995) (citations omitted).

direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so.<sup>5</sup>

The Department's regulations outline several factors to be considered in determining whether a worker is an employee or an independent contractor.<sup>6</sup> Factors that support the existence of an employer-employee relationship include:

- Right to discharge an employee without being held liable for damages for breach of contract;
- Furnishing of tools, equipment, material, and a place to work;
- Continuous performance of work for the employer;
- Payment of a fixed wage on a weekly or hourly basis.

Factors that support an independent contractor relationship include:

- Performance of a specific job at a fixed price;
- Following a distinct trade, occupation, business, or profession in which an individual offers services to the public to be performed without the control of those seeking the benefit of his or her training or experience;
- Unreimbursed expenses and fixed, ongoing costs regardless of whether work is currently being performed;
- Significant investment in real or personal property that is used in performing services for someone else;
- Right to employ assistants with the exclusive right to supervise their activity and completely delegate the work.<sup>7</sup>

The regulations also provide that if, upon examination of the facts of a case, an employer-employee relationship is found to exist, the parties' own designation or description of the relationship is immaterial.<sup>8</sup>

Viewing the evidence as a whole, the undersigned concludes Hernandez Roofing has met its burden to prove that all of its services are performed by independent contractors—not employees. Although it would have been helpful if Hernandez had written contracts and invoices to explain his operations, such writings are not required under the law. Additionally, Hernandez completed the pre-audit questionnaire and services provided list, and attempted in good faith to provide all requested information. His credible hearing testimony then confirmed that the manner of operation between Hernandez Roofing and each person who provided roofing labor more closely resembles the regulatory description of a business and its independent contractors than an employer/employee relationship.<sup>9</sup>

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<sup>5</sup> 871-23.19(1).

<sup>6</sup> See *gen.* 871-23.19.

<sup>7</sup> *Id.*

<sup>8</sup> 871-23.19(7).

<sup>9</sup> See *Gaffney*, 540 N.W.2d at 434 (right to control “manner and means of

In particular, Hernandez provided only the general parameters of each roofing job. He did not set the hours of work, or control the manner in which the services were provided.<sup>10</sup>

Additionally, as confirmed by Colin, each subcontractor took a particular job at an agreed-upon rate. Hernandez did not pay laborers an hourly or weekly rate, and did not offer paid benefits or holiday pay.<sup>11</sup>

Last, each subcontractor remained free to perform roofing labor services for other persons or entities, and to refuse a particular job for any reason. They also could make a profit or loss. If the roof was not completed in a satisfactory fashion, the subcontractor—not Hernandez Roofing—was responsible for resolving the problem.<sup>12</sup>

### **ORDER**

IWD's June 13, 2022 decision that an employer-employee relationship existed between the individuals identified during the audit is **REVERSED**. IWD is directed to take all steps necessary to effectuate this decision.

Dated this 30<sup>th</sup> day of September, 2022.



Carla J. Hamborg  
Administrative Law Judge

cc:

Hernandez Roofing, LLC., c/o Rafael Luna Hernandez, Appellant (By mail)  
Valerie Cramer, Attorney (By Mail)  
Jeffrey Koncsol, IWD (By AEDMS)  
Lisa Gaeta, IWD (By AEDMS)  
Barbara Corson, IWD (By AEDMS)

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performance” is principal test to determine whether worker is an employee); *see also* 871-23.19(1) (with employer/employee relationship employer has the right to control and direct “details and means by which that result is accomplished.”

<sup>10</sup> *Id.* at 23.19(1).

<sup>11</sup> *Id.* at 23.19(4). The audit admittedly originated from a particular individual or individuals who considered himself or themselves to be employees of Hernandez Roofing. No additional information was submitted regarding the unemployment insurance checks, however. The fact one or more persons applied for benefits in the name of Hernandez Roofing, without more, is insufficient to determine actual employee status.

<sup>12</sup> *Id.* at 23.19(3).

**APPEAL RIGHTS**

**This decision constitutes final agency action.**

Any party may file with the presiding officer a written application for rehearing within 20 days after the issuance of the decision. A request for rehearing is deemed denied unless the presiding officer grants the rehearing request within 20 days after its filing.

Any party may file a petition for judicial review in the Iowa district court within 30 days after the issuance of the decision or within 30 days after the denial of the request for rehearing. *See Iowa Admin. Code r. 871-26.17(5).*

**Case Title:** HERNANDEZ ROOFING LLC V. IOWA WORKFORCE  
DEVELOPMENT  
**Case Number:** 23IWDM0009  
**Type:** Proposed Decision

IT IS SO ORDERED.

A handwritten signature in black ink, reading "Carla Hamborg". The signature is written in a cursive style with a large initial "C".

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Carla Hamborg, Administrative Law Judge